86-1441

No.

IN THE

SUPREME COURT OF THE UNITED STATES

LEONARD SOLTIES AND CECILIA SOLTIES, h/w
Petitioners,

v.

MASSEY-FERGUSON, INC.,
Respondent,

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

On Appeal From the Final Order Denying Reargument Entered by the United States Court of Appeals for the Third Circuit at No. 86-3092 Entered November 19, 1986

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QUESTIONS PRESENTED FOR REVIEW

1. Is a plaintiff in a civil action denied procedural due process when his unopposed request for a brief continuance because of family illness is denied and he is compelled to go to trial with substituted counsel?

2. May a federal court sitting in diversity ignore controlling state law as that law has been declared by the highest court of that state?

3. Is a plaintiff in a civil action denied procedural due process when the trial court arbitrarily and erroneously excludes critical rebuttal testimony contrary to the Federal Rules of Civil Procedure and established precedent?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs below: Leonard and Cecilia Solties, husband and wife.

Defendants below: Massey-Ferguson, Inc., and International Harvester Co.

International Harvester Co. was dismissed as a party defendant before trial by agreement of the parties. It did not participate in the trial or appellate proceedings below.

Massey-Ferguson, Ltd., is the parent company of Massey-Ferguson, Inc. The shares of Massey-Ferguson, Inc., are held by Massey-Ferguson (Delaware), Inc., which shares are owned by Massey-Ferguson, Ltd., a Canadian corporation.

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REPORTS OF OPINIONS IN THE COURTS BELOW

The United States District Court for the Western District of Pennsylvania did not issue an opinion. The opinion of the panel of the Third Circuit Court of Appeals is unpublished. The opinion of the Third Circuit Court of Appeals is attached hereto as part of the appendix pursuant to Supreme Court Rule 21.1(k)(i).

THE BASIS FOR THIS COURT'S JURISDICTION

The judgment of the Third Circuit Court of Appeals to be reviewed was entered on October 23, 1986. A Petition for Rehearing was timely filed on November 6, 1986. The Petition for Rehearing was denied by the Third Circuit Court of Appeals by Order dated November 19, 1986. The judgment of October 23, 1986, and the Order of November 19, 1986, are attached hereto in the appendix pursuant to Supreme Court Rule 21.1(k)(i).

This Court may exercise jurisdiction over this case pursuant to 28 U.S.C.A. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived or life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action was commenced in the United States District Court for the Eastern District of Pennsylvania on July 6, 1983, and subsequently transferred to the United States District Court for the Western District of Pennsylvania. It was commenced as a diversity jurisdiction/product liability/negligence case and sought damages for injuries suffered by Leonard and Cecilia Solties arising out of an accident on November 2, 1982, when Leonard Solties became entangled in a corn picker designed and manufactured by Massey-Ferguson. As a result of that accident, Leonard Solties lost his right leg below the knee and suffered

severe, disabling and disfiguring injuries to his dominant right hand. The theory of liability under which the case was tried was that the corn picker was defective because of a lack of guarding over the parts in which Mr. Solties became entangled and the absence of any means for him to turn off the machine once he was caught in it. The principal defense theory was that Leonard Solties had deliberately reached in to the moving parts of the machine in order to remove an alleged obstruction.

The bifurcated case was tried before Senior Judge Joseph Willson and a jury from January 13, 1986, until January 16, 1986. The jury returned a verdict for Massey-Ferguson. There were no special interrogatories shedding light on the bases of the verdict. A timely appeal to the Circuit Court of Appeals for the Third Circuit was filed on January 31, 1986. By opinion and order dated October 23, 1986, the Third Circuit affirmed. A timely petition for reargument was filed on November 6, 1986, which was denied by order dated November 19, 1986. This Petition for Certiorari was timely filed thereafter.

This Petition raises three issues. The first is the constitutionality and propriety of the District Court's refusal to grant an unopposed, short continuance based upon the unavailability of plaintiffs' trial counsel necessitated by family illness. The second is the trial court's *gross* deviation in its charge from the dictates of the controlling law of the Commonwealth of Pennsylvania, as declared by the Pennsylvania Supreme Court, which deviation constituted a repudiation of the *Erie* doctrine and was so great a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The third concerns the trial court's erroneous refusal to allow crucial witnesses to testify, thereby depriving plaintiffs of an opportunity to present their case and rising to the level of a violation of procedural due process.

The corn picker was made by Massey-Ferguson in the early-mid-1950's when Massey was doing business as Massey-Harris, Inc., (R. 192a, 232a-233a).[1] It was an implement that picked and

1. Citations to the record refer to the reproduced record filed with the Third Circuit.

husked corn by means of a series of mechanical processes. (R.223a-24a).

Power to the corn picker was supplied by a tractor which pulled and drove the corn picker by what is known as a "power take off," ("PTO") at the tractor's rear. (R.133a). The corn picker had no source of power of its own. (R.223a). The PTO is a driveshaft type of arrangement which transmits power to the corn picker by rotation. (R.133a). The means of turning the PTO on and off was a lever located behind the tractor's seat. (R.151a). There was no other means of turning the PTO on and off. A farmer entangled in the corn picker could not reach this lever. (R.113a-14a).

The corn picker was designed to harvest one row of corn at a time. At its front was a single "V"-shaped snout at the opening of which was a series of gathering chains and snapping rolls. (Drawings of the corn picker from the operator's manual are included in the Third Circuit appendix at 354a, 359a and 374a. Copies are included in the appendix filed herewith.) The gathering chains, one on each side of the opening, pulled the corn stalks in to the snout and kept them moving toward the rear of the snout. The snapping rolls, located beneath the gathering chains, consisted of two circular rolls with raised spiral fluting running their entire length. These rolls were designed to grab the corn stalks and pull them downward at a speed of approximately seven feet per second. (R.133a). The rolls rotated toward each other at high speed creating an "in-running nip point." (R.266a). The space between the rolls was adjustable but invariably set at a distance smaller than the diameter of an ear of corn. (R.138a, 137a). This high speed downward motion of the stalks through this narrow in-running nip point "snapped" the ears of corn off the corn stalks. (R.133a-143a). The ears were then further processed in other parts of the machine until a husked ear was dropped by an elevator in to a wagon trailing the tractor and picker. (R.134a, 137a). There was no guard or shielding of any sort over the area in which the gathering chains and snapping rolls operated. An operator caught in these rolls and/or chains would be unable to turn the corn picker off.

On November 2, 1982, Leonard Solties, according to his testimony, fell while walking around the operating machine in an effort to aurally locate the source of a suspicious noise. Two prior efforts to locate the source of the noise while the machine was turned off had been unsuccessful. (R.130a, 139a, 140a-42a, 166a, 169a, 175a). His right hand came in to contact with the inside surface of the snout and slid down in to the totally unguarded snapping rolls. (R.174a). The dorsal surface of his hand became engaged in the snapping rolls and could not be extricated. (R.175a-76a). The machine could not be turned off. In his frantic struggles to escape the machine, Mr. Solties's right leg also became caught. (R.143a).

This case was instituted under the law of strict of liability as adopted and declared by the Pennsylvania Supreme Court in cases such as *Azzarello v. Black Brothers Co.*, 480 Pa. 547, 391 A.2d 1020 (1978) and *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974). A claim for negligence was also pleaded.

The defects alleged to support the product liability claim were the total absence of guarding over the exposed chains and rolls and the absence of any means of turning off the machine that could be operated by a farmer trapped in the snout area. (R.111a-12a). Plaintiffs' expert advocated at trial the use of "stripper plates", flat metal plates, above the snapping rolls to narrow the width of the opening, (R.228a-30a), and a cable-activated shut-off device reachable by a trapped operator. (R.32a-36a, 234a-37a, 242a). A claim for punitive damages, on which the trial court refused to permit evidence (R.119a), was premised upon proof that Massey marketed a defective corn picker despite its knowledge of an extraordinary number of accidents involving its corn pickers and pickers substantially similar to its own, and its participation in industry association committees and meetings at which the dangers of these machines were acknowledged and discussed, but never cured. The evidence would have shown such knowledge as early as the 1930's. Evidence would have been presented on the availability of cut-off technology dating back to the turn of the century. (R.32a-36a).

Massey's main defense at trial was its contention that Leonard Solties had deliberately reached in to the machine to remove a clog. (Tr. 28-9, 432, 434). It argued that its theory was supported by a statement allegedly made by Leonard Solties to his brother Anthony within a day or two of the accident while he was in intensive care. (R.299a, 302a). Massey also premised its theory upon arguments that the corn picker was badly worn despite testimony by another farmer that the machine had served him well during that same harvest season. Finally, Massey argued that the safety devices advocated by plaintiffs were unworkable even though no evidence of any tests, studies, or experience with such devices was offered.

Three business days before trial plaintiffs moved on the record, without opposition, for a short continuance based upon the serious illness of plaintiffs' trial counsel's wife. (R.105a, 106a-08a, 115a-17a). Judge Willson denied this request, characterizing the situation of a serious illness as "nothing", (R.107a), and insisting, *incorrectly*, that designated trial counsel had failed to appear at pretrial conferences. (R.88a, 100a, 106a). This denial forced a last minute substitution of trial counsel — a point for some unknown reason highlighted by Judge Willson at the very opening of the trial and frequently, and unnecessarily, emphasized by him throughout the trial in the presence of the jury. (R.118a, 158a, 177a, 202a, 203a, 190a-91a, 303a).

Plaintiffs were precluded at trial from referencing their claim for punitive damages. (R.119a-193a-94a). This ruling was based upon an alleged failure to raise the claim in plaintiffs' pretrial narrative or in pretrial conferences — notwithstanding a clear reference to it in the complaint, the narrative and at an August 27, 1985, pretrial conference. (*E.g.* R.26a). Judge Willson also based his ruling on an alleged absence of relevant discovery, although how that would justify precluding a claim was never explained, and notwithstanding a substantial list of relevant exhibits in the pretrial narrative. (R.28a-30a). (*Compare* R.10a-11a and 25a *with* 220a-22a; Tr. of 8/27/85, pp. 30-31.).

Judge Willson refused to permit plaintiffs' expert to diagram the corn picker for the jury in order to assist the jury's understanding of the machine and the safety devices he advocated.

Judge Willson ruled that to be admissible, evidence must be "heard". (R.224a).

Judge Willson refused to permit plaintiffs' expert to testify regarding the history of corn pickers on the issue of knowledge of their dangers and frequency of injuries caused by them. (R.193-97a). He unilaterally refused, for no discernible reason, to permit plaintiffs to present a case based upon negligence theories which had been pleaded in the complaint. (R.101a-02a). He refused to permit plaintiffs' expert to testify that the age and condition of the machine were irrelevant to the circumstances of this accident even though Massey was arguing to the contrary. (R.239a). The purported basis for this ruling was his *sua sponte* substitution of a brief letter written by plaintiffs' expert to plaintiffs' counsel for the extensive discovery materials supplied by plaintiffs to the defendant and the court regarding the expert's testimony, and his requirement that the expert's testimony be confined to the scope of the letter even though it was never submitted or intended as a report or expert witness interrogatory answers. (R.32a-87a, 205a-22a). The extensive material supplied by plaintiffs in discovery, including interrogatory answers, papers authored by the expert, test results, etc., had been provided to Massey and the court and were apparently satisfactory to Massey because it withdrew a request for the expert's deposition after receiving them. (Proceedings of 8/27/85, pp. 16-17).

Judge Willson refused to charge the jury on the settled Pennsylvania concept of substantial factor in his instructions on causation, as requested by *both* parties. Instead, using lay dictionary definitions, he charged the jury that the alleged defects had to be *the* cause of the accident. No basis was given for this charge which represented a marked departure from Pennsylvania law. (R.312a, 339a).

Judge Willson charged the jury on contributory negligence notwithstanding that there is no such defense to a strict liability claim under Pennsylvania law, (R.229-41a), and he had ruled for unknown reasons that plaintiffs would not be permitted to present a negligence case. (R.101a-02a).

Judge Willson refused at trial to permit plaintiffs to use as rebuttal the deposition of Frances Solties, another of Leonard's

brothers, which would have contradicted the testimony of Anthony regarding Leonard's alleged conversation in intensive care. Judge Willson based his ruling solely on the erroneous conclusion that since Frances resided in the Western District of Pennsylvania he could be subpoenaed and, therefore, his deposition could not be used. Judge Willson adhered to this mistaken view even after it was pointed out to him that the witness resided more than one hundred miles from the court house. (R.306a-09a, 395a).

Judge Willson, finally, refused to permit Leonard's treating physician, Dr. John Lubahn, to testify on rebuttal that Leonard's injuries were inconsistent with the manner in which Massey claimed the accident happened. (R.462a-65a). The doctor would have testified that because *all* of the damage to Leonard's hand was to the dorsal surface, and did not involve the palm or knuckles beyond the first joints, it was improbable that Leonard was reaching into the machine since under such circumstances the typical injury involves the entire hand being drawn in to the machine with circumferential injuries, i.e., to all sides of the hand over three hundred and sixty degrees. (R.465a). Judge Willson ruled that this was not proper rebuttal even though it went exclusively to refuting Massey's version of how the accident did happen.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I. THE TRIAL COURT'S DENIAL OF PLAINTIFFS' UNOPPOSED REQUEST FOR A SHORT CONTINUANCE BASED UPON THE SERIOUS ILLNESS OF PLAINTIFFS' TRIAL COUNSEL'S WIFE DEPRIVED PLAINTIFFS OF DUE PROCESS.

The week before trial plaintiffs moved for a continuance because of the serious illness of the wife of plaintiffs' trial counsel, Richard M. Rosenbleeth. The request was unopposed. There is nothing of record to suggest, and no suggestion has ever been made, that the request was motivated by anything other than the utmost good faith, without any desire to delay the trial for more

than a brief period. The trial court denied the request for no apparent reason other than its completely *mistaken* belief that Mr. Rosenbleeth had never appeared before the court and had not signed documents filed with the court. (R.106a). For many months prior to trial Mr. Rosenbleeth's name had appeared on every paper filed with the court. (R.37a, pretrial narrative). He had appeared before the court to identify himself as trial counsel. (R.100a).

While the grant or denial of a continuance is ordinarily entrusted to the sound discretion of the trial court, it has been held that that discretion can be abused when the trial court's zeal to dispose of litigation prejudicially deprives litigants of substantive rights. *Sutherland Paper Co. v. Paper Box Co.*, 183 F.2d 926 (3d Cir.), *cert. denied*, 340 U.S. 906 (1950); *Latham v. Crofters, Inc.*, 492 F.2d 913 (4th Cir. 1974). That discretion must *always* be exercised in the interest of justice. *Cornwell v. Cornwell*, 118 F.2d 396 (D.C. Cir. 1941). This Court has held:

> "The term 'discretion' denotes the absence of a hard and fast rule, . . . When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances of the law, as directed by the reason and conscience of the judge to a just result."

Lagnes v. Green, 282 U.S. 531, 541 (1931). *See*, *Gaspar v. Kassm*, 493 F.2d 964 (3d Cir. 1974) (Denial of a continuance based upon illness of a party reversed; consideration given to length of delay, absence of prior delay, absence of prior requests for continuance, diligence in making the request, lack of evidence request was not made in good faith, absence of prejudice to the opposing party and absence of opposition to the request.).

Here, the request was unopposed. There was no delay by plaintiffs. There had been one prior continuance resulting from the case not being reached on the trial list. Another continuance was by agreement of all of the parties. A third continuance resulted from *Massey's* error, unquestionably made in good faith, in failing to identify certain witnesses. There was no question

here that the request was not being made in good faith and there was no delay in bringing the request before the trial court. Nor was there any indication by the lower courts that they viewed the request as being to the slightest degree indicative of bad planning or procrastination. Simply put, there was no logical reason to deny the request. Under these circumstances, continuances are rarely, if ever, denied. *See, e.g., Smith-Weik Machinery Corp. v. McCormack Machine and Engineering Co.*, 423 F.2d 842 (5th Cir. 1970); *David v. Operation Amigo, Inc.*, 378 F.2d 101, 103 (10th Cir. 1967).

As a result of the trial court's refusal of the continuance, a last minute substitution for plaintiffs' chosen counsel was necessitated. (R.118a). The magnitude of this case required experienced counsel and no other attorney familiar with the case could lay claim to such experience. (R.107a). The Solties had sought out and retained experienced trial counsel and were entitled to that benefit at trial. *See United States ex rel. Carey v. Rundle*, 409 F.2d 1210 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970) (habeas corpus proceedings). (Due process requires an opportunity to retain counsel of choice and bars arbitrary action prohibiting effective use of that counsel.).

Minimal due process requires an opportunity for litigants to have their case heard at a reasonable time and *in a meaningful manner*. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Under appropriate circumstances a denial of a continuance may rise to the level of a violation of due process. *Grigsby v. Mabry*, 637 F.2d 525, 527 (8th Cir. 1980) (habeus corpus proceedings). Where without reason a party is deprived of counsel, even in a civil case, due process *must* be of concern. The meaningfulness of the right to be heard is lost, if that right is conferred at the same time the litigant is deprived of counsel for reasons beyond counsel's or the litigant's control. If, as has been said, *Gandy v. Alabama*, 569 F.2d 1318 (5th Cir. 1978), the test to be applied in such cases is a weighing of the competing interests of the parties and the court, in this case that balance was overwhelmingly tipped in plaintiffs' favor. Their request was unopposed and was for but a brief period. The only "interest" advanced by the trial

court's rush to trial in the face of these circumstances was, admittedly, its own by way of a case disposition. (R.115a-16a). This is not sufficient basis for depriving plaintiffs of their chosen counsel, and by so doing deprive them of due process.

II. THE HOLDINGS OF THE COURTS BELOW ARE SO GREAT A DEPARTURE FROM PENNSYLVANIA LAW AS TO AMOUNT TO A REPUDIATION OF THE ERIE DOCTRINE:

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), established the well-settled principles governing the law that will control federal cases brought under diversity jurisdiction:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." 304 U.S. at 78.

In *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), Justice Frankfurter explained *Erie* as follows:

> "In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *[Erie]* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in State court a block away, should not lead to a substantially different result." 326 U.S. at 109.

See also, Byrd v. Blue Ridge Royal Electric Corp., 356 U.S. 525 (1958).

The application of the *Erie* doctrine arises in this case because of two portions of the trial court's charge to the jury. First, the trial court refused a charge requested by *both* parties that the jury be instructed that plaintiffs carried their burden of proof on causation if they convinced the jury that the defects alleged were a "substantial factor" in causing the injuries. Second, the trial court told the jury that Leonard Solties had departed in his conduct from that which the "ordinary user" of the corn picker would have done, that he knew there was a danger but proceeded nevertheless to confront it, and that he was injured while "playing" with the corn picker. Nowhere in the court's charged was there an instruction that under Pennsylvania law contributory negligence was not a defense. Pennsylvania's comparative negligence statute was not alluded to. The requirements for a defense of assumption of the risk in a product liability case were never mentioned.

The law of Pennsylvania, which the courts below were *bound* to follow, is that a plaintiff has proven causation if the alleged defect is found by the jury to have been a "substantial factor" in causing the injuries complained of. *Ford v. Jeffries*, 474 Pa. 588, 379 A.2d 111 (1977); *Flickinger Estate v. Ritsky*, 452 Pa. 69, 305 A.2d 40 (1973). So uniformly accepted is this concept by the courts of Pennsylvania that a charge on "substantial factor" has been included in the Pennsylvania Suggested Standard Civil Jury Instructions.[2]

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2. "In order for the plaintiff to recover in this case, the defendant's . . . conduct must have been a substantial factor in bringing about the accident. That is what the law recognizes as legal cause. A substantial factor is an actual, real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the accident." 3.25.

"Where the negligent conduct of a defendant combines with other circumstances and other forces to cause the harm suffered by the plaintiff, the defendant is responsible for the harm if his negligent conduct was a substantial contributive factor in bringing about harm, even if the harm would have occurred without it." 3.27

The trial court nevertheless *refused* this charge without explanation. In its stead, it defined cause according to lay dictionaries and repeatedly emphasized that for plaintiffs to prevail they had to prove that the defect was *the* cause of the injuries. (R.312a, 339a). This departure from Pennsylvania law, *as to which the parties were in agreement*, amounted to a repudiation of the *Erie* doctrine. The Third Circuit affirmed by searching the record for an isolated, supposedly correct, instruction and found no error. Overlooked by the majority were numerous contradictory statements in the charge. See Mansmann, J., dissenting.

Elsewhere in the charge, the trial court instructed the jury as follows:

> "I don't decide the facts, you do, but I want to point this out to you. Is Mr. Solties [sic] testimony and his deposition and what he said here, are you satisfied that he told you what he remembered, his memory of what happened, the man was hurt, blood all over him. He told his wife. She says he didn't know, various stories have been told here now. Does she know? Do we know today? What caused — whether that any defect, if [sic] was one or two of those defects, did they play any part in it or whether he walked around and fell down inspite of everything, and did he get hurt on account of falling into the machine, and he left a free running machine.
>
> "This man is a mechanic, he's run garages, he's made his living at it for years and he walked away twice. He didn't — he turned it off, he knew it was a danger to walk around there and play with that machine while it was running. The third time he thought, well, I can't find it, maybe I'll turn it on, but he got into trouble.
>
> "Now, was that trouble he got into caused by one of the two or three things they claim here? The guard, the cable that would shut it off. There was shut off devices, you know, not only, on the switch, on the wires that the witnesses talked about, but there was a lever there that shut off the P.T.O. . . . turn the lever and it was disconnected — that's what ordinary users of it would do . . . ." (R.340a-41a).

These factually inaccurate, (No witness testified that there was a cut-off switch on any wires and Leonard Solties most certainly was not "playing" with the corn picker.), prejudicial comments injected contributory negligence into the case in a way grossly prejudicial to the plaintiffs and *totally contrary to Pennsylvania law*. The Third Circuit found no error in this charge by reasoning that a comment that the plaintiff was negligent is harmless if the jury is not also told that such negligence is a defense. The dissent, however, correctly pointed out that the harm arises from the failure to instruct the jury that the negligence is *not* a defense. The majority, ignoring the plain error rule, also reasoned, in the alternative, that the objection was not preserved, without addressing the dissenting judge's conclusion that the objection made was, under the circumstances, sufficient to alert the trial judge to the claim of error.

Under Pennsylvania law contributory negligence has *never* been a defense to a product liability action and it has been held repeatedly and without deviation, until now, that *the plaintiffs' alleged negligence is utterly and totally irrelevant*. *E.g.*, *Hammond v. International Harvester Co.*, 691 F.2d 646 (3d Cir. 1982); *Holloway v. J. B. Systems, Ltd.*, 609 F.2d 1069 (3d Cir. 1979); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). Furthermore, while assumption of a risk is a defense under Pennsylvania law to a product liability action, its elements were never defined for the jury, i.e., that the defendant must prove a subjective knowledge and appreciation of the nature, character and extent of the danger and a voluntary decision to confront it. *Ferraro v. Ford Motor Co.*, 423 Pa. 324, 223, A.2d 746 (1966).

The upshot of these errors was that plaintiffs were forced to satisfy a novel burden of proof, in flat contradiction of the *undisputed* law of Pennsylvania, and the jury was told that Leonard Solties had been careless without also being told that the carelessness was absolutely irrelevant. In each instance the charge to the jury was *directly and completely contrary to Pennsylvania law* to such a degree that Pennsylvania law was effectively repudiated and, with it, the *Erie* Doctrine.

III. THE TRIAL COURT'S ERRONEOUS REFUSAL TO PERMIT PLAINTIFFS TO CALL TWO CRITICAL REBUTTAL WITNESSES DENIED PLAINTIFFS DUE PROCESS.

Plaintiffs sought to call two rebuttal witnesses. The first was Francis Solties, whose testimony, by deposition, would have been that at the time Leonard was supposedly making an adverse statement to Anthony Solties about how the accident happened, Leonard was, in fact, permitted absolutely no visitors. The second witness was Dr. John Lubahn, a surgeon specializing in hand injuries, who had treated Leonard since the day of the accident. His testimony would have been that the nature of Leonard's injuries was inconsistent with him having reached into the machine.

As to Frances, the trial court refused to permit him to testify on the erroneous ground that since he was within the court's subpoena range his deposition could not be used. The trial court adhered to this incorrect position even after it was pointed out that Frances resided more than one hundred miles from the courthouse. It can not be disputed that this holding ran flatly contrary to F.R.C.P. 32(a) which permits the use of any witness's deposition if the witness resides more than one hundred miles from the courthouse. *See Derewicki v. Pennsylvania Railroad Co.*, 352 F.2d 436, 441 (3d Cir. 1965); *Frederick v. Yellow Cab Co. of Philadelphia*, 200 F.2d 483 (3d Cir. 1952). The Third Circuit affirmed on the ground that since Frances's testimony would only have contradicted Anthony as to the time and place of the alleged statement, its exclusion from the record was harmless, thereby apparently adopting the view that testimony proving that a conversation could not possibly have happened at the time and in the manner testified to by another witness is irrelevant, regardless of the importance of the alleged statement.

As to Dr. Lubahn, the trial court ruled only that the testimony was not proper rebuttal. It did so despite the obvious and palpable fact that Dr. Lubahn's testimony was limited in its purpose to establishing that the accident did not happen in the manner contended by Massey. It was not offered to prove how the

accident happened, only to prove how it did not happen. The Third Circuit affirmed on the basis that since, according to its reading of the record, the jury was not told that contributory negligence was a defense this evidence was irrelevant. The fact that the jury was told Leonard Solties had been careless, while not being told that such carelessness was *not* a defense, was overlooked by the Court.

Rebuttal has been defined as "a term of art, relating to evidence introduced by a plaintiff to meet new facts brought out in his opponent's case in chief." *Morgan v. Commercial Union Assurance Co.*, 606 F.2d 554, 555 (5th Cir. 1979). It is "evidence which dispels, explains, disapproves or contradicts evidence given by the adverse party." 5 *AM. Jur.*, Trials 527 (1966). The general rule is to exclude evidence in rebuttal not made necessary and relevant by the opponent's case in chief and to permit only such evidence that goes to counter new facts presented in the defense case in chief. *Allen v. Prince George's County*, 737 F.2d 1299, 1305 (4th Cir. 1984); *Zurich v. Wher*, 163 F.2d 791, 793 (3d Cir. 1947). Where there can be no surprise or prejudice to the opposing party, and the Third Circuit did not point to any, these rules may be departed from. *Zurich v. Wher*, *supra*; *Emerick v. U.S. Suzuki Motor Corp.*, 750 F.2d (3d Cir. 1984) (The true purpose of the evidence is controlling.) Merely because evidence *could* have been admitted in the plaintiff's case in chief does not automatically preclude its use as rebuttal. *Martin v. Weaver*, 666 F.2d 1013 (6th Cir. 1981), *cert. denied*, 446, U.S. 962 (1982); *National Surety Corp. v. Heinbokel*, 154 F.2d 266 (3d Cir. 1946). A plaintiff has no duty to rebut a defense yet to be heard. *Friend v. C.I.R.*, 102 F.2d 153 (7th Cir. 1939).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), it was held by this Court that a fundamental requisite of procedural due process is the opportunity to be heard. *Accord*, *Grannis v. Ordean*, 234 U.S. 385 (1914). In a trial context this opportunity to be heard must, by inescapable logic, include the opportunity to offer evidence and, if required under the circumstances in order to preserve the right to be heard, an abridgement of that opportunity may be violative of due process. *See Pollock v. Baxter Manor Nursing Home*, 716 F.2d 545 (8th Cir. 1983).

Equally fundamental to due process is the right and opportunity to be heard at a reasonable time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). A hearing, without a meaningful opportunity to be heard, may be as fatal to due process as a total denial of a hearing, *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3d Cir. 1973), and without an opportunity to be heard, all other rights become illusory. *Martin v. Laver*, 686 F.2d 24 (D.C. Cir. 1982).

The trial court's erroneous exclusion of this rebuttal evidence effectively precluded plaintiffs from presenting their case by tying their hands at the moment they should have been afforded an opportunity to challenge Massey's defenses. Without Frances Solties's testimony there was no way to rebut Anthony's testimony. Without Dr. Lubahn's testimony, Massey's contention of how the accident happened was permitted to stand unchallenged by irrefutable physical evidence. In both instances the evidence was pure rebuttal. And in both instances, its exclusion rose to the level of a due process violation by erroneously depriving plaintiffs of an opportunity to present evidence crucial to their case.

Respectfully submitted,

BLANK, ROME, COMISKY & McCAULEY

By:_____

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CERTIFICATE OF SERVICE

I, hereby certify that three true and correct copies of the foregoing were served by first-class mail upon the following counsel of record:

CHESTER S. FOSSEE, ESQUIRE
Reale, Fossee & Ferry, P.C.
900 Manor Building
564 Forbes Avenue
Pittsburgh, Pa. 15219

_____

Richard M. Rosenbleeth

DATED: February 13, 1987 and March 5, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

October 23, 1986

TO: C. Gary Wynkoop, Esquire
Herbert J. Johnson, Jr., Esquire
C.S. Fossee, Esquire*

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case No. 86-3092 and copies are enclosed herewith.

PETITION FOR REHEARING (FRAP 40)

Your attention is specifically directed to Chapter VIII B of the Court's Internal Operating Procedures.

B. Rehearing In Banc.

Rehearing in banc is not favored and ordinarily will not be ordered except:

(1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) where the proceeding involves a question of exceptional importance.

This Court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

Nor, except in rare cases, has the court granted rehearing in banc where the case was decided by a judgment order, a memorandum opinion, or unpublished per curiam opinion.

When a petition for rehearing has been filed by a party as provided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request in banc hearing under 35(b), it is presumed that such petition requests both panel rehearing and rehearing in banc.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3092

LEONARD SOLTIES and CECILIA SOLTIES, his wife,
Appellants

vs.

MASSEY-FERGUSON, INC.
and
INTERNATIONAL HARVESTER, CO.

Appeal from the United States District Court
for the Western District of Pennsylvania — Erie
(D.C. Civil No. 84-229 E)

Argued
September 29, 1986
Before: ALDISERT, *Chief Judge* and WEIS and MANSMANN,
Circuit Judges.
October 23, 1986

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C. Gary Wynkoop, Esq. (ARGUED)
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OPINION OF THE COURT
(Filed , 1986)

ALDISERT, *Chief Judge*.

This is an appeal from a products liability action, tried on the issue of liability only, in which the jury found for the defendant manufacturer of a corn picker. The appeal presents questions whether a new trial should be ordered because of error in jury instructions, and rulings of the trial judge refusing the admission of demonstrative evidence, denying rebuttal testimony, and denying a continuance of trial. We find no error and will affirm.

I.

Leonard Solties received serious injuries when he attempted to release a jam in an operating corn picker manufactured by the defendant Massey-Ferguson, Inc. In a diversity case under Pennsylvania law, Solties and his wife, Cecilia, brought a products liability action against the manufacturer, contending that there were two defects in the equipment that caused the injuries: that there should have been "stripper plates" over the cob-snapping rolls of the corn picker to act as a guard; and that there should have been a cable-activated emergency shutoff that could be activated by a person who got caught in the rollers. Appellants have summarized their contentions: "Plaintiffs' theories of liability were that the corn picker was defectively designed because of Massey's *complete failure* to guard *in any way* the in-running nip point created by the snapping rolls and its *total failure* to provide *any* means for an operator trapped in those rolls to turn the machine off." Appellants' brief at 22.

Solties is a farmer. After his corn picker became inoperable, he purchased the Massey corn picker (manufactured 30 years prior thereto) from a neighboring farmer. While Solties was operating the corn picker, it jammed. Yet, while the equipment was still operating, Solties attempted to clear the jam with his hand. His hand came into contact with the picker's snapping rolls and was pulled into the rear of the picker's head. As a result of the downward pull of a corn stalk through the rolls, or an effort

to get his balance or brace himself, his right leg entered the front portion of the picker's head, so that the lower leg was caught by the picker's gathering chains. He sustained serious injuries. The case was tried before Judge Willson and a jury on the issue of liability only. The jury found for Massey-Ferguson.

Appellants' brief presents five issues for our consideration: whether the trial court erred when it refused to instruct the jury that the defendant could be found liable if its defective product was *a* substantial factor in causing Leonard Solties' injuries, and instead instructed the jury that the defect had to be *the* cause of the injuries; whether the trial court erred by instructing the jury that Solties was guilty of contributory negligence; whether the trial court abused its discretion when it refused to permit plaintiffs' expert witness to utilize a hand drawing to illustrate his testimony; whether the trial court abused its discretion when it refused to permit plaintiffs to present a rebuttal; and whether the trial court abused its discretion when it refused to grant an unopposed request for a brief continuance that was based on an alleged personal condition of one of plaintiffs' trial counsel.

II.

Appellants contend that the jury instruction was improper. Although we note at the outset that appellants' objection to the instruction was inartful, we nevertheless will give them the benefit of the doubt and notice their contention. Appellants rely on section 431 of the Restatement (Second) of Torts, which provides:

> The actor's negligent conduct is a legal cause of harm to another if
>
> (a) his conduct is a substantial factor in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Restatement (Second) of Torts §431(a)-(b).

Under Pennsylvania law, strict liability under section 402(a) requires the plaintiff to prove that the product was "in a defective condition" and that the defect caused the injury. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). Appellants contend that it was error for the district court not to have charged the jury on the "substantial factor" component of causation. The court's failure to do so, however, cannot be said to have substantially prejudiced appellants' case.

Preliminarily, we observe that the substantial factor component of causation is intended to reduce the attenuation between cause and effect. *See* Restatement (Second) of Torts §431 comment a; *see also id.* §433 & comments thereto. Therefore, the recitation of the component in a jury charge would narrow the field of possible legal causes, not broaden it. Accordingly, appellants' argument, that the inclusion of that component would have allowed the jury to consider *more* possible causes of Solties' accident, is misplaced.

From our study of the court's entire charge, it appears that the jury was properly instructed on the law of causation. In speaking to the generic definition of "cause," the court stated:

> The cause of it, the cause of my hurting my fist is if I bang it against that side of this desk maybe. See, *a* cause, *a* cause. Now, if there's a defect there, that doesn't cause it, then that's the problem in your case is of course, what caused this thing, what caused this thing?

App. at 339 (emphasis supplied).

When explaining causation as it related to the issues in the case at bar, the court instructed:

> What caused — Whether that any defect, if [it] was one or two of those defects, *did they play any part in [the accident]* or whether he walked around and fell down in spite of everything, and did he get hurt on account of falling into the machine, and he left a free machine running.

App. at 340-41 (emphasis supplied).

It can be seen from the court's instruction that, contrary to appellants' contentions, the court did not require too close a relationship between cause and effect, not did it exclude the possibility of multiple causes. Indeed, one could forge a strong argument that this instruction required less a connection between defect and accident than does the Restatement.

Finally, we note that, far from prejudicing appellants, the trial court at one point gave appellants what was tantamount to a directed verdict should a defect be found, by instructing the jury:

> If you find that lack of a cut off switch or guards over the snapping rolls made this corn picker defective, that it's unsafe for its use, Massey-Ferguson caused the harm.

App. at 343. This instruction omits the requirement of causation altogether. Appellants cannot at this point claim that the court instructed the jury on too stringent a formulation of causation.

III.

Appellants next argue that the court erred in charging the jury on contributory negligence. Appellants' brief at 24-26; *see* text at App. 340-41, *reprinted in* appellants' brief at 24. They contend that, under Pennsylvania law, contributory negligence is not a defense to a products liability action. Appellants' brief at 25. Our examination of the record, however, indicates that plaintiff did not object to the charge as required under Rule 51. Failure to object to an instruction precludes one from assigning any alleged error in that instruction as a basis for a new trial on appeal. Moreover, even if the point was properly preserved, we are not persuaded that the court's language amounted to a charge on contributory negligence.

IV.

The trial judge refused to permit an expert to make a hand-drawing to augment his testimony and other exhibits. Photographs of the corn picker were freely used by counsel for both parties and also were made available to the jury. Under these

circumstances, the failure to permit a hand drawing of the snapping rolls was not an abuse of discretion.

V.

At the conclusion of Massey-Ferguson's case-in-chief, appellants attempted to offer as rebuttal testimony the deposition of Solties' brother Francis and a videotape deposition of Dr. John Lubahn. The court denied the offer. Here, too, we find no abuse of discretion. Francis' deposition testimony allegedly was sought to be introduced to contradict testimony given by Solties' other brother, Anthony. Francis' testimony would not have gone to the substance of Anthony's testimony, but would only have contradicted it insofar as it related to the time at which Leonard told Anthony about the accident. Moreover, the testimony sought to be contradicted related to assumption of risk, a defense on which the jury was not instructed. Accordingly, even if the proffered deposition testimony was proper for rebuttal, appellants' substantial rights were not affected by its exclusion.

The purpose of Dr. Lubahn's testimony was to counter the defense theory that Leonard Solties did not injure his hand as the result of any defect, but because he tried to disengage corn from the jammed picker with his hand, while the motor was still running. In light of the fact that the jury was never instructed on contributory negligence or assumption of risk, however, appellants could not have been prejudiced by the absence of Dr. Lubahn's testimony. Moreover, a case can be made that the testimony of Dr. Lubahn should have been introduced in the plaintiffs' case-in-chief and was not proper rebuttal.

VI.

Finally, appellants request a new trial on the basis that the court improperly denied a continuance requested on behalf of one of appellants' counsel, Mr. Rosenbleeth. Upon being told that Mr. Rosenbleeth had a serious illness in his family, the trial judge stated, "[W]e can't postpone a case on that statement." App. at 107. The only further explanation for the requested continuance was forthcoming from Mr. Johnson, another of

appellants' counsel: "They explained to me it's a serious problem with [Rosenbleeth's] wife and for the next 30 to 45 days that may tell the answer on it, and he's very upset." *Id*. No explanation appears in the record describing what the "serious problem" involved, nor was there any explanation why counsel could not appear to try the case for the relatively short period required. At trial, appellants were represented by co-counsel Haft, who was fully involved with all stages of the case. The trial court already had extended the time for discovery once and had reopened discovery once. Futhermore, the court made it clear as early as November 4, 1986 that trial would commence on January 14, 1986. We find no abuse of discretion.

VII.

We have carefully considered all the contentions of the appellants.

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Chief Judge

Leonard Solties and Cecilia Solties, his wife, v.
Massey-Ferguson, Inc.

No. 86-3092

MANSMANN, *Circuit Judge*, dissenting.

Among the allegations of error the plaintiffs bring before us are two issues regarding the trial judge's charge to the jury which I believe are so basic and fundamental that reversal is warranted. These issues involve the trial judge's repeated emphasis of the words "the cause" without accurately explaining legal causation and his descriptions of the husband-plaintiff's activity with the cornpicker which might have led the jury to infer erroneously that contributory negligence was a defense in a §402A case. I part company with the majority because my reading of the charge as a whole leads me to conclude that the charge did not fairly and adequately submit the issues to the jury and was so confusing and misleading that the verdict should not stand. *See United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984).

I.

For even lawyers sophisticated in §402A litigation, causation often poses semantical problems. Indeed, where an injured party's damages are based on allegations of the manufacturer's failure to provide guards or safety devices to protect against a user's inadvertent actions or mishaps, as frankly is often the case, the lawyers present differing proposed points for charge on the question of causation.

While Pennsylvania law is now settled that, as the majority opinion states, "the product was 'in a defective condition' and that the defect caused the injury", citing *Berkebile*, (Typescript p.5), it is also accepted Pennsylvania law that causation be clearly defined for the jury — legal cause as opposed to causation in fact. *See Whitner v. Lojeski*, 437 Pa. 448 (1970). It is precisely because multiple *factual* causes may bring about the injury that causation *correctly defined* is crucial to a jury's correct understanding of the legal issues.

The applicable standard for determining legal or proximate cause under Pennsylvania law is whether the alleged wrongful

acts were a substantial factor in bringing about the plaintiffs' harm. *E. J. Stewart, Inc. v. Aitken Products, Inc.*, 607 F. Supp. 883 (E.D. Pa.), *aff'd*, 779 F.2d 42 (3d Cir. 1985). Indeed, the Pennsylvania Suggested Standard Civil Jury Instructions recommend the use of this standard as follows:

> If you find that the product was defective, the defendant is liable for all harm caused by such defective condition. A defective condition is the legal cause of harm if it was a substantial factor in bringing such harm about. Pa. SSJI (Civ) §8.04 (June 1984).

This is precisely the point for charge proposed by the plaintiff and the one summarily dismissed by the trial judge. Indeed, at oral argument before our court, counsel for the defendant-manufacturer admitted that the substantial factor charge is one regularly and routinely given by Pennsylvania trial judges in §402A cases.

Instead, the trial judge chose to define causation by relying on Webster's Seventh Collegiate and the American Collegiate Dictionaries. As he explained in his charge,

> Now, cause is not a word that takes the Supreme Court Justice of the United States or me or anybody else to worry about what it means. It's cause. It's used in the sense but I had my secretary look up a couple of them this morning. It's in a couple of dictionaries . . .

(App. at 338-339.) The jury was led to believe that the lay, non-legal or "dictionary definition" was correct.[1]

---

1. The Pennsylvania Suggested Standard Civil Jury Instructions define legal cause as follows:

3.25 (Civ) LEGAL CAUSE

In order for the plaintiff to recover in this case, the defendant's (negligent) (reckless) (intentional) conduct must have been a substantial factor in bringing about the accident. This is what the law recognizes as legal cause. A substantial factor is an actual, real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the accident. Pa SSJI (Civ) §3.25 (June 1984).

Rather than explaining clearly that more than one "cause" may co-exist and the manufacturer still be found liable, the trial judge chose to dismiss cause as if it were an all-or-nothing, exclusive concept. The trial judge repeatedly stated "the cause" instead of "a cause" and chose to disregard plaintiffs' counsel's exception properly called to his attention at the close of the charge.

While I believe the charge is fatally flawed by the failure to give the standard "substantial factor" instruction, I also believe that the numerous instructions given regarding "the cause" override the correct but isolated §402A instruction. Some examples are as follows:

> . . . the protection which is required is attained by the necessity of proving that there was a defect in the manufacture or design of the product and that such defect was the legal cause of the injuries. Defect is the cause. (App. at 338)
>
> The cause of it, the cause of my hurting my fist is if I bang it against that side of this desk maybe. See, a cause, a cause. Now if there's a defect there, that doesn't cause it, then that's the problem in your case is of course, what caused this thing, what caused this thing? (App. at 339)
>
> . . . If he did it, if he didn't do it, was it the cause by these failures to put on these devices that they — that counsel says should have been on there? Was that the legal cause? . . . (App. at 341-42)
>
> . . . If you find, however, that Massey-Ferguson manufactured or sold a defective product, which was the cause in bringing about the Solties harm, then Massey is liable for all of the harm caused by the defect. . . . (App. at 343)
>
> See, what's the cause? If the defect is the cause, if it is in fact, it might have been in other injuries, some greater or lesser and so on, whether he could forsee it or whether they couldn't. (App. at 344)

The omission of an explanation or definition of substantial factor may have led the jury to believe that an "either/or" situation existed. As well, the charge could have been construed to require the jury to impose liability on defendant Massey-Ferguson only if there was no cause of injury other than the defect(s) alleged. This charge was therefore in error and warrants reversal.

II.

During trial great emphasis was placed on the farmer's activities in attempting to repair the machine. This information, coupled with the confusion over legal and factual causes, made it incumbent upon the trial judge to explain and to dispel any thoughts about contributory negligence which the jury would have had. As we said in *Holloway v. J. B. Systems Ltd.*, 609 F.2d 1069, 1073 (3d Cir. 1979), "The Pennsylvania Supreme Court, in *Azzarello v. Black Brothers Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978), condemned the use of instructions that might lead a jury, in a §402A action, to believe that the reasonableness of the defendant's conduct was an issue in the case."

Far from dispelling such notions, however, the trial judge's comments were directed to the issue of contributory negligence in such a way as to be prejudicial to plaintiffs' case. The following portion of the jury charge illustrates the nature of the judge's error:

> What caused -— whether that any defect, if it was one or two of those defects, did they play any part in it or whether he walked around and fell down in spite of everything, and did he get hurt on account of falling into the machine, and he left a free machine running.
>
> There's a mechanic, he's run garages, he's made his living at it for years, and he walked away twice. he didn't — He turned it off, he knew it was a danger to walk around there and play with that machine while it was running.

(App. p. 340-341)

I would find that the combination of the judge's remarks about the plaintiff "playing with the machine" and walking around and falling down "in spite of everything" coupled with the incorrect definition of causation could easily impel a jury to be improperly prejudiced by the farmer's activity.

The charge, in addition to being prejudicial to the plaintiffs, was inadequate in describing the law which governs the farmer's activity and the defect in question. Pennsylvania law is clear that contributory negligence has no relevance in a products liability action. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). The charge does not adequately delineate the circumstances under which the risk of loss should be placed on the manufacturer. When the charge is read as a whole, I find that there is an impermissible implication of contributory negligence as a defense. As such, I cannot say that the error was harmless. *See Bailey v. Atlas Powder Company*, 602 F.2d 585 (3d Cir. 1979).

The majority relies upon its finding that plaintiffs' counsel failed to object, under Rule 51, to the judge's factual recitation. To the contrary, I believe a clear, if abbreviated, objection was made at sidebar and would find that the issue is properly subject to our review (App. at 349). The objection made, coupled with prior discussion between counsel and the court in reviewing the proposed points for charge, makes it evident that the trial judge knew what counsel meant. It is the trial judge's comprehension and understanding that are important in situations such as these, not only the literal meaning of the words.

III.

Because I believe the trial judge's charge on either the issue of causation or the issue of contributory negligence merits reversal, I do not find it necessary to reach appellants' other issues. For the reasons stated, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3092

LEONARD SOLTIES and CECELIA SOLTIES, his wife,
Appellants

vs.

MASSEY-FERGUSON, INC.
and
INTERNATIONAL HARVESTER, CO.

(W.D. Pa. Civ. No. 84-229 E)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, and SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Chief Judge

Dated: November 19, 1986

(2)

No. 86-1441

IN THE

Supreme Court of the United States

October Term 1986

LEONARD SOLTIES and CECILIA SOLTIES, h/w
Petitioners,

v.

MASSEY-FERGUSON, INC.,
Respondent.

BRIEF FOR RESPONDENT MASSEY-FERGUSON, INC. IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

On Appeal From the Final Order Denying Reargument
Entered by the United States Court of Appeals
for the Third Circuit at No. 86-3092
Entered November 19, 1986.

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QUESTIONS PRESENTED FOR REVIEW

I. THE TRIAL COURT'S DENIAL OF PLAINTIFFS' REQUEST FOR A CONTINUANCE DOES NOT PROVIDE A BASIS FOR A CONSTITUTIONAL CHALLENGE OF A VIOLATION OF DUE PROCESS.

II. THE TRIAL COURT'S CHARGE WAS CONSISTENT WITH PENNSYLVANIA LAW AND AS SUCH DOES NOT CONSTITUTE A BASIS FOR REVIEW BY THIS COURT.

III. THE TRIAL COURT'S EXCLUSION OF PLAINTIFFS' REBUTTAL TESTIMONY WAS PROPER AND DOES NOT PROVIDE A BASIS FOR A CONSTITUTIONAL CHALLENGE OF A VIOLATION OF DUE PROCESS.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs below: Leonard and Cecilia Solties, husband and wife.

Defendants below: Massey-Ferguson, Inc., and International Harvester Company.

International Harvester Company was dismissed as a party defendant before trial and did not participate in the trial or appellate proceedings below.

Massey-Ferguson, Ltd. is the parent corporation of Massey-Ferguson, Inc. The shares of Massey-Ferguson, Inc. are held by Massey-Ferguson (Delaware), Inc., which shares are owned by Massey-Ferguson, Ltd., a Canadian corporation. This information was included on the disclosure of corporate affiliations and financial interest statement filed with the United States Court of Appeals for the Third Circuit at No. 86-3092 on February 11, 1986.

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TABLE OF CITATIONS

TABLE OF CITATIONS—*(Continued)*

COUNTERSTATEMENT OF THE CASE

The instant action was filed as a result of an accident which occurred on November 2, 1982, at which time Leonard Solties sustained injuries to his right hand and leg while attempting to unplug a corn picker by reaching into an area where snapping rolls and gathering chains were rotating. Mr. Solties did this in spite of being fully aware of all of the hazards and dangers involved in attempting to unplug a corn picker while it was still operating. (R. 189a-190a).

The instant action was commenced as a diversity jurisdiction/products liability action against Massey-Ferguson, contending that there were two defects in the equipment that caused the injuries sustained by Mr. Solties. The first contention was that there should have been "stripper plates" over the snapping rolls to act as a guard and the second item was that there should have been an emergency cutoff device in the form of a wire placed on the shield to the right of the snapping rolls which could shut off the equipment in case the plaintiff became caught in the rollers. (T.R. 218).

After a three-day trial on liability only before Judge Willson and a jury, a verdict was returned in favor of Massey-Ferguson. Thereafter, Petitioners appealed this matter to the Court of Appeals for the Third Circuit, which affirmed the trial court. A Petition for Reargument was subsequently denied. Plaintiff filed the instant Petition for Certiorari, alleging that there exists a sufficient basis for this Honorable Court to grant Certiorari.

The corn picker involved in the accident was manufactured by the Respondent under its prior corporate name of Massey-Harris in 1950 or 1951, slightly more than 30 years before the accident. It is a single row pull type corn picker that is connected to a tractor at the power takeoff unit. Through the use of gears and chains, the various components of the corn picker operate. (R. 132a-133a).

The plaintiff's injuries occurred at the head of the corn picker, which contains two separate moving parts. The first part is the gathering chains which are used to gather the corn stalks and move them into the head and up the snapping rolls. The second part is the snapping rolls which rotate toward each other and are designed to grip and pull the corn stalks in a downward motion and to snap the ears of corn from the stalks in such a manner that between 75 to 90 percent of the husks are also removed. These moving parts are contained within a V-shaped structure of smooth metal so that the corn stalks will slide easily over them and through the snapping rolls. (T.R. 311-312, 314-316).

The ears of the corn then pass through an opening in the sheet metal of the head onto an elevator that carries them to the husking bed. The small husking bed removes the balance of the husks from the picked corn. (T.R. 311). From the bed, the corn is then carried by means of an elevator to a position from which it is dropped into a wagon or similar container that is pulled behind the corn picker. (R. 134a).

It is necessary to coordinate the speed of the tractor over the ground with the speed of the gathering chains and the snapping rolls. Ideally, the corn stalks will remain in a vertical position as they move through the head of the picker. The head has pointed metal snouts which help to pickup bent over stalks of corn. The gathering chains then help move these stalks into snapping rolls. (T.R. 314-316). For the gathering chains to function, they have metal fingers attached which grab on to the stalks of corn.

The snapping rolls have sharp ridges of metal so that they can grip stalks to impart the necessary downward motion so that the corn picker can move through the stalk at the appropriate rate of speed. Due to different varieties of corn, the snapping rolls are adjustable as far as their separation is concerned. (T.R. 229). In addition, the set screws can be utilized to impart a more aggressive

grip to the corn stalk to facilitate its movement through the snapping rolls. (R. 160a).

The type of corn involved in the instant case is field corn, utilized to feed farm animals. Since the corn is to be stored, it is essential that all of the husks be removed since husks will spoil the corn. (R. 156a, 263a).

On the morning of the accident, the plaintiff found that the worn snapping rolls of the corn picker would not pull the damp corn stalks through in an appropriate manner thereby causing the corn picker to plug. Despite knowing that he was to shutof the PTO before attempting to unplug the picker, (R. 189a-190a), Mr. Solties did not do so and when he attempted to unjam the head of the corn picker with the snapping rolls still rotating, the stalks began to move through and his right hand was pulled into the very rear portion of the corn picker head. Mr. Solties' hand was still in the form of a fist when it came in contact with the rolls as the injury he sustained was to the knuckle portion of his right hand. (R. 178a). As a result of the downward pull of the corn stalk through the rolls, or in an effort to get his balance and brace himself, Mr. Solties' right leg entered the front portion of the head so that the lower leg was caught by the gathering chains.

Leonard Solties did not testify that the accident occurred as set forth above, but rather, testified that while walking around the operating machine in an effort to locate a noise, he slipped, causing his right hand to first come into contact with the inside surface of the snout and then slide down into the snapping rolls. However, this version of the accident was contradicted at the trial by either direct testimony, circumstantial evidence or physical facts.

The contradictions began with the acquisition of the corn picker and carried on all through Mr. Solties' story including what he did immediately after the injury occurred. His testimony as to how he obtained the equipment was contradicted by the prior owner of the

equipment, Homer Barber. (R. 260a). His testimony as to what he accomplished on the morning of the accident was contradicted by Neal Chelton and Petitioner's brother, Anthony Solties. (R. 264a-265a, 298a). Mr. Solties' testimony as to the condition of the snapping rolls was contradicted by the testimony of Neal Chelton and his brother, Anthony Solties. (R. 266a, 298a-299a). Mr. Solties' version as to how the accident occurred was contradicted by the testimony of his brother Anthony Solties, and by the physical facts of the construction and location of the items within the equipment and the injuries themselves. As an example, Anthony Solties testified that his brother told him he was injured while trying to unjam the equipment. (R. 299a).

The Petitioner's description of how he fell into the equipment would have necessitated severe injuries to his upper right extremity caused by the gathering chains which pass over the snapping rolls. However, the physical facts reveal that the injury was limited to the knuckle portion of his hand. Therefore, the only place that he could have contacted the snapping rolls was toward the rear of the head where there were no gathering chains. (R. 285a). Since his hand entered the equipment in the form of a fist, based upon his injury, it is far more likely that he encountered the rolls as a result of having been grasping a corn stalk rather than having fallen.

Petitioners attempted to support their liability claim by alleging that there were two defects in the equipment that caused the injuries sustained by the plaintiff, the lack of "stripper plates" over the snapping rolls and the lack of an emergency shutoff device which could be used to shutoff the equipment in the case of someone becoming caught in the rollers. However, the expert testimony introduced by the plaintiff was overshadowed by the extremely credible testimony of Respondent's expert, John Zich. Mr. Zich has an engineering degree in agriculture and 48 years of direct experience in the farm machine

industry. (T.R. 287). He was directly involved in the design and construction of one of the corn pickers built with stripper plates that plaintiff's expert referred to in his testimony. (T.R. 305). Contrary to plaintiff's expert, Mr. Zich testified that the stripper plates were thoroughly investigated, tested and utilized by various manufacturers. As a result of this experience, it was clear that the pickers using stripper plates would not husk the corn which, while desirable for sweet corn or popcorn, was detrimental to field corn which was what Mr. Solties was farming. (T.R. 309-312).

As was stated by the Peititioner himself and Neal Chelton, husks on field corn cause it to spoil. (R. 156a, 263a).In addition, stripper plates will not prevent injuries since they are underneath the gathering chains and are wider apart than the snapping rolls. (R. 283a-284a). Therefore, since they are not designed to be guards, they would not protect a farmer from injury if he chose to ignore the warnings and attempted to unjam an operating corn picker.

Petitioners also attempted to prove that the equipment should have had an emergency stop mechanism. This of course would not have prevented plaintiff's injury and based upon the mechanism of Mr. Solties' injury, it would not have even reduced the severity. The design recommended by Petitioners' expert would have interfered with the effective operation of the picker and increased the incidence of plugging thereby increasing the possibility of injury by farmers having to unplug the equipment. (T.R. 320-321), (R. 276a). In addition, the mechanism advocated by Petitioners' expert would have been physically impossible for Mr. Solties to utilize because of its location and the amount of strength required to activate it. (T.R. 320-322).

The evidence was clearly supportive of Mr. Zich's opinion that the product in question was not defective and therefore not a cause of plaintiff's injuries. (R. 277a). The matter was submitted to the jury in such a

manner that if the jury found that a product was defective, they would return a verdict for the plaintiff. The jury was not charged that they could find the defendant was not liable because the plaintiff assumed a risk. The jury's verdict for Massey-Ferguson was a clear statement that they did not find the product to be defective.

I. THE TRIAL COURT'S DENIAL OF PLAINTIFFS' REQUEST FOR A CONTINUANCE DOES NOT PROVIDE A BASIS FOR A CONSTITUTIONAL CHALLENGE OF A VIOLATION OF DUE PROCESS

It is well-established that the granting or refusal of a continuance is a matter within the sound discretion of the trial court, and shall not be reversed unless there is an abuse of discretion. See generally *Grothusen v. National Railroad Passenger Corp.*, 603 F. Supp. 486 (3rd Cir., 1984); *Harvey v. Andrist*, 754 F.2d 569 (5th Cir., 1985). When presented with a constitutional challenge, "[T]he determination of whether a denial of a continuance is arbitrary enough to violate due process depends on the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *United States v. Bernhardt*, 642 F.2d 251, 252 (8th Cir., 1981), citing *Ungar v. Sarafite*, 376 U.S. 575 (1984). A review of the circumstances present in the instant case, and the reasons presented for the continuance, clearly indicate that the trial court did not abuse its discretion by refusing Petitioners' request and likewise, did not deprive Petitioners of due process.

The record reveals that prior to the subject request for a continuance, the trial court had continued the case on two occasions. The first continuance occurred because the case was not ready for trial. The second continuance was due to the unavailability of counsel. At an argument held on November 4, 1985, the Court made it clear that the case would be tried commencing January

13, 1986, and that a final pre-trial would take place on January 7, 1986. (T.R. 35).

In addition to the fact that the case had already been previously continued, the trial judge was not certain as to his future status as a senior judge. Judge Willson was the sole judge to handle this matter from the time of its initial transfer to the Western District and as such, did not want to leave this matter to be tried by a judge totally unfamiliar with the facts and the parties. (R. 115a-116a).

While the trial judge had valid reasons for desiring to dispose of the trial of this case when scheduled, Petitioners failed to provide the Court with substantial justification for continuing this matter. The cases relied on by the Petitioners as support for their position that the trial judge abused his discretion, are not controlling on the instant case. In *Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co.*, 423 F.2d 842 (5th Cir., 1970), the trial court had significantly advanced the trial date and refused a request for a continuance of four days. Nor is *Latham v. Crofters, Inc.*, 492 F.2d 913 (4th Cir., 1974), controlling on the instant situation, where the attorney was also the defendant and was ill and unable to attend the trial. Likewise, in *Cornwell v. Cornwell*, 118 F.2d 396 (D.C. Cir., 1941), and *Gaspar v. Kassam*, 493 F.2d 964 (3rd. Cir. 1974), the requests for continuances were because of the illness of a *party* to the respective actions.

In the case at bar, Petitioners' request was vague and indefinite both as to the *reason* for the request and the *duration* of the continuance. The only explanation ever given for the continuance was set forth by Mr. Johnson, one of Petitioners' counsel when he said "They've explained to me it's a serious problem with the wife and for the next 30 to 45 days that may tell the answer on it, and he's very upset." (R. 107a). Based on this vague statement, Judge Willson denied the request and stated: ". . .[W]e can't postpone a case on that statement." (R.

107a). In spite of Petitioners being advised that their reason for a continuance was insufficient, the record is void of any additional justification for the continuance. There was never any explanation given as to what the "serious problem" involved, nor was there any explanation as to why Mr. Rosenbleeth could not appear to try the case for the relatively short period of time it would have required.

The Petitioners argue that Mr. Rosenbleeth was their lead counsel and that they were forced to find substitute counsel for him at the last minute. The record does not support these contentions. To begin, Mr. Rosenbleeth did not take an active part in the preparation of the case. Out of nine depositions that were taken, he attended three. In addition, out of all the pre-trial conferences that were held, he attended only one. On the other hand, Mr. Haft, who also represented the Petitioners, attended all of the depositions and all of the pre-trial conferences. It is little wonder that the trial judge had difficulty accepting Petitioners' statements that Mr. Rosenbleeth was the lead counsel in this case.

With regard to Petitioners' contentions that they were required to substitute counsel at the last minute, the facts indicate that a week before trial, Petitioners were aware of the fact that the case would proceed. Petitioners had the Court's permission to utilize Mr. Rosenbleeth on only the important matters, so that he would not have to remain during the entire trial. (R. 116a-117a). Mr. Haft was present through the entire pre-trial stage of the case and was also present during the trial. It is clear that if in fact substitute counsel was necessary, ample time and assistance were available to prepare for and try this case.

Petitioners attempt to find a basis for a violation of due process by arguing that they were denied their opportunity to be represented by counsel of their choice at the time of trial. Initially, it must be pointed out that Petitioners' reliance on case law involving criminal proceedings as support for their position that there was a

violation of due process, is not dispositive of the instant case. The right of a defendant in a criminal proceeding to be represented by counsel of his choice is guaranteed by the Constitution. In such a case, due process demands that a defendant be afforded a fair opportunity to obtain the assistance of counsel of his choice and to prepare and conduct his defense. This constitutional mandate is satisfied so long as the *accused* is afforded a fair or reasonable opportunity to obtain particular counsel, and so long as there is no arbitrary action prohibiting the effective use of such counsel. However, the conclusion is inescapable that "[A]lthough the right to counsel is absolute, there is *no absolute right to a particular counsel.*" *United States ex rel Carey v. Rundle*, 409 F.2d 1210, 1215 (3rd. Cir., 1969), cert. denied, 397 U.S. 946 (1970). (emphasis supplied). As was stated in *Gandy v. Alabama*, 569 F.2d 1318 (5th Cir., 1978), "at some point, that right [to counsel of choice] must bend before countervailing interests involving effective administration of the courts." *Gandy*, 569 F.2d at 1323, n. 9.

Petitioners attempt to argue that they had a Constitutional right to be represented at trial by Mr. Rosenbleeth. However, it must be noted that in a *criminal* matter, involving life and liberty interests, there is no absolute right to a particular counsel. Therefore, in a civil case where only property interests are at stake, the due process requirements are much less stringent, and an *absolute* right to a particular counsel does not exist. Ordinarily, "all that due process requires in a civil case is proper notice and service of process and a court of competent jurisdiction." *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (1982), rehearing denied 702 F.2d 81, cert. denied 464 U.S. 818 (1983).

Petitioners cannot argue that they were not granted sufficient notice of the trial of this matter, and that they were not given a fair opportunity to present their case. There is no contention by the Petitioners that they were not adequately represented at the trial by competent

counsel. To the contrary, Petitioners' position is that they were entitled to be represented by Mr. Rosenbleeth alone. As is clear from the case law, such an *absolute right* to particular counsel is not constitutionally protected.

Based upon the substantial advance notice as to the dates for commencing the trial, the reasons for the case to proceed on schedule, the number of lawyers involved in the representation of the Petitioners throughout the proceedings, and the vague unexplained reasons given by Petitioners for the continuance, it is clear that the denial by the trial judge of Petitioners' request for continuance did not constitute an abuse of discretion and further, did not constitute any violation of Petitioners' due process.

II. THE TRIAL COURT'S CHARGE WAS CONSISTENT WITH PENNSYLVANIA LAW AND AS SUCH DOES NOT CONSTITUTE A BASIS FOR REVIEW BY THIS COURT.

Pursuant to the well-established principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny, it is clear that Pennsylvania law is applicable to the instant action. Furthermore, it is clear that under Pennsylvania law, strict liability under §402A requires the plaintiff to prove that the product was "in a defective condition" and that the defect *caused* the injury. *Azzarello v. Black Brothers*, 480 Pa. 547, 391 A.2d 1020 (1978); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975); *Webb v. Zern*, 422 Pa. 424, 228 A.2d 853 (1966). As is evident from a review of the trial court's charge, Judge Willson properly instructed the jury on these principles.

Petitioners aver that the *Erie* doctrine was repudiated by the trial court's failure to include the words "substantial factor" in the charge on causation. A review of

the trial court's charge in its entirety, which was affirmed by the Third Circuit, establishes that Petitioners' arguments are without merit.

The trial court's charges on causation began as follows:

> So this machine today though was under 402(a), the Restatement of the Law, and that simply says this: the issue I mentioned a half dozen times and I guess I better talk to it one more time, and that's when a manufacturer manufactures a product, and guarantees its safety for the use for which it was intended. If a defect — if it has a defect which causes an injury, liability is certain. (R. 329a).

Instructing the jury on the definition of cause, the trial court stated:

> The cause of it, the cause of my hurting my fist is if I bang it against that side of this desk maybe. See, *a cause, a cause*. Now if there is a defect there, that does not cause it, then there's the problem in your case is of course, what caused this thing, what caused this thing? (R. 339a). (emphasis supplied).

Judge Willson continued by stating:

> *If you find that lack of a cutoff switch or guards over the snapping rolls made this corn picker defective, that it is unsafe for its use, Massey-Ferguson caused the harm.* (R. 343a). (emphasis supplied).

As is indicated by the excerpts from the charge, the trial judge properly instructed the jury. In fact, as was stated by the Third Circuit, far from prejudicing the Petitioners, the trial court instructed the jury that *if it found a defect in the corn picker, Massey-Ferguson caused the harm to Leonard Solties*. This charge by Judge Willson was tantamount to a directed verdict against Massey-Ferguson if a defect in the corn picker was found by the jury.

A review of the trial court's charge does not indicate any instruction, or inference to the jury, that there must be a finding of "no other cause of the injuries" as a prerequisite to liability. Contrary to Petitioners' arguments, the trial court's charge was not contrary to Pennsylvania law on causation, but rather, eliminated from the jury's discretion the possibility of alternate or concurrent causes.

Petitioners also aver that the trial court's charge injected contributory negligence into a products liability case which was contrary to Pennsylvania law. However, as was indicated by the Third Circuit, the Petitioner did not properly object to the charge as is required under Rule 51 of the Federal Rules of Civil Procedure. A failure to object to an instruction precludes the Petitioner from now alleging error as a basis for a new trial on appeal.

It is well-established that a trial judge has the discretion to summarize the evidence gathered at trial and the extent of his review depends largely upon the circumstances of the case and is left within the judgment and discretion of the trial judge. *McGowan v. Devonshire Hall Apartments*, 278 Pa. Super. 229, 420 A.2d 514 (1980). Petitioners attempt to rely on an isolated portion of the charge, arguing that it amounted to an instruction on the contributory negligence of Leonard Solties, contrary to Pennsylvania law. It is clear, however, from the text of the charge (R. 340a-342a), that the comments on the testimony related directly to credibility.

Petitioners also make reference to the issue of assumption of the risk. While Massey-Ferguson believed that sufficient evidence had been introduced to permit a charge on assumption of the risk, the trial court refused to grant said charge. As such, Petitioners have no basis to allege that the trial court's charge was contrary to Pennsylvania law on this issue.

In an effort to allege a basis upon which this Court may grant Certiorari, Petitioners aver that they were forced to satisfy some "novel burden of proof." A review

of the trial court's charge in its entirety clearly indicates that the charge was proper under Pennsylvania law and did not present any novel burdens. The Third Circuit, upon reviewing the charge, held that errors were *not* present on either the issue of causation or contributory negligence.

Petitioners have failed to present the mandated special and important reasons required by Supreme Court Rule 17.1 for review on Writ of Certiorari, and as such, the Petition should be denied.

III. THE TRIAL COURT'S EXCLUSION OF PLAINTIFFS' REBUTTAL TESTIMONY WAS PROPER AND DOES NOT PROVIDE A BASIS FOR A CONSTITUTIONAL CHALLENGE OF A VIOLATION OF DUE PROCESS.

The exclusion by the trial court of the Petitioners' offer as rebuttal testimony the deposition of Frances Solties, the Petitioner's brother and the videotape deposition of Dr. John Lubahn, one of Petitioner's treating physicians, does not constitute a violation of the Constitutional right of procedural due process. Under the Federal Rules of Evidence, a trial court has broad discretion in determining the relevancy and admissibility of evidence. "It is only when the trial court excludes relevant evidence without sufficient justification that a defendant's right to compulsory due process is violated." *United States v. Peltier,* 585 F.2d 314, 332 (8th Cir., 1978), cert. denied 440 U.S. 945 (1979).

In the instant case, the excluded evidence was rebuttal testimony, for which the standard of review is well-established. In *Bowman v. General Motors Corp.,* 427 F. Supp. 234 (E.D. Pa. 1977), the Court stated:

> There is a unanimous agreement that on rebuttal it is properly within the discretion of the trial judge to limit testimony to that which is precisely

> directed to rebutting new matter or new theories presented by the defendant's case in chief. (Citations omitted).
>
> Conversely, the *only* cases in which the District Court's discretion to exclude rebuttal testimony has been found to be abused are those in which defendant's witnesses have presented an alternative theory or new facts or have otherwise created a need for a particularized response. (Citations omitted).

Id. 427 F. Supp. at 240. See also, *Upshur v. Shephard*, 538 F. Supp. 1176 (E.D. Pa. 1982).

Pursuant to Rule 403, Federal Rules of Evidence, the District Court may exclude relevant evidence which is otherwise cumulative, a waste of time, misleading or confusing to the jury which causes undue delay or unfair prejudice. The District Court's control is further enhanced by the discretionary powers under Federal Rule of Evidence 611(a) which states that the Court shall exercise control over the mode and order of interrogating witnesses and presenting evidence. As the "governor of the trial for the purpose of assuring its proper conduct," the District Court exercises broad powers to "determine generally the order in which parties will adduce proof." *Gedders v. United States*, 425 U.S. 80, 86 (1976).

The proffered deposition testimony of Frances Solties was sought to be introduced to contradict the testimony given by Solties' other brother, Anthony. As was stated by the Third Circuit, Frances' testimony would not have gone to the substance of Anthony's testimony, but would only have contradicted it insofar as it related to the time at which Leonard told Anthony about the accident. The Third Circuit also found that the testimony sought to be contradicted related to assumption of the risk, a defense on which the jury was never instructed. Finally, the Third Circuit determined that even if the

proffered deposition testimony was proper for rebuttal, Petitioners' substantive rights were not affected by its exclusion.

Petitioners also aver that the testimony of Dr. Lubahn was erroneously excluded. However, the testimony of Dr. Lubahn was not proper rebuttal. Respondents intended to present as an expert Dr. Peter Fuller. A report filed by Massey-Ferguson, and attached to their Pre-Trial Statement, indicated that Dr. Fuller opined that the injuries sustained by Leonard Solties were the result of his attempts to unplug the corn picker while it was in operation. (See Massey-Ferguson Pre-Trial Statement). However, Dr. Fuller was not permitted to testify. (T.R. 393). Since Massey-Ferguson was prevented from introducing as evidence in their case in chief the theory presented by Dr. Fuller, the proffered testimony of Dr. Lubahn was not proper rebuttal.

As was stated above, the trial judge did not instruct the jury on the assumption of the risk. Therefore, the offered testimony of Dr. Lubahn did not go to the issue of causation. In light of the fact that Massey-Ferguson's expert was not permitted to testify as to how the accident occurred, and the jury was not instructed on assumption of the risk, any basis for Petitioners to introduce Dr. Lubahn's testimony was eliminated.

Finally, the portion of Dr. Lubahn's testimony offered by Petitioners as rebuttal was obtained over objection of Massey-Ferguson's counsel. Dr. Lubahn's opinion that the injuries to Leonard Solties' hand were not consistent with Leonard having reached into the machine as contended by Dr. Fuller was beyond any report filed by Dr. Lubahn or supplied by Petitioners' counsel. As such, the offered testimony of Dr. Lubahn was in contravention of the rules governing pre-trial procedure and experts' opinions. Thus, this particular portion of Dr. Lubahn's testimony was neither admissible in plaintiff's

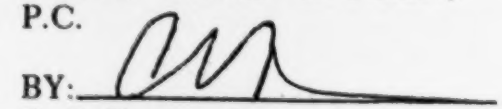
case in chief nor did it constitute proper rebuttal and as such, was properly excluded and did not violate any procedural due process.

Petitioners' argument that the exclusion of this testimony rises to the level of a due process violation is completely unsupported by case law. The case law cited by Petitioners as controlling involved situations where litigants were not given adequate notice, or were denied such rights as the ability to communicate freely with their counsel. Petitioners have failed to come forth with any case law which supports their contentions that rebuttal testimony, such as was excluded in the instant case, constitutes a violation of procedural due process which would provide a basis for review by this Court.

CONCLUSION

Petitioners have failed to present the mandated special and important reasons required by Supreme Court Rule 17.1 which indicates the basis for review on Writ of Certiorari by this Honorable Court. As such, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
REALE, FOSSEE & FERRY, P.C.

BY: 

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Respondent

(3)

86-1441

No.

IN THE

SUPREME COURT OF THE UNITED STATES

LEONARD SOLTIES AND CECILIA SOLTIES, h/w
Petitioners,

v.

MASSEY-FERGUSON, INC.,
Respondent.

APPENDIX TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

On Appeal From the Final Order Denying Reargument Entered by the United States Court of Appeals for the Third Circuit at No. 86-3092 Entered November 19, 1986

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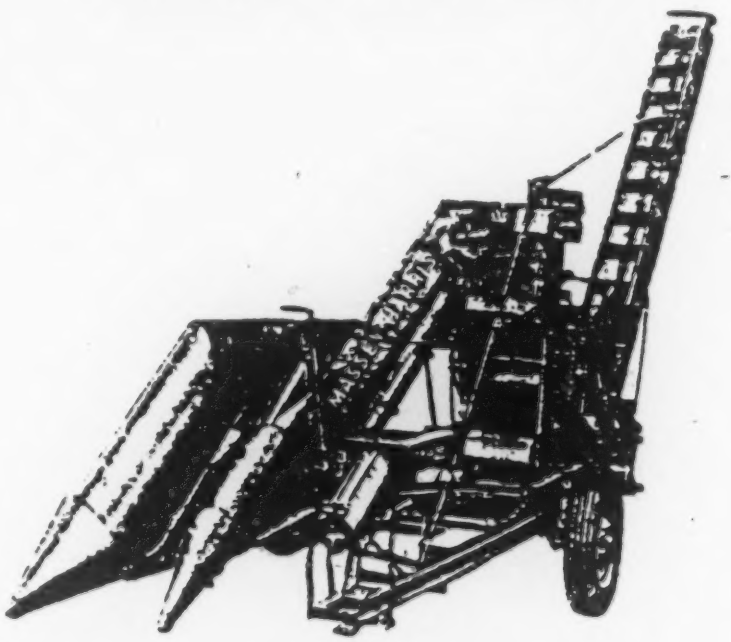
Form No. 694 256 M91

Setting Up and Operating Instructions

for the

MASSEY-HARRIS ONE ROW PULL TYPE CORN PICKER



Manufactured by

THE MASSEY-HARRIS COMPANY
INCORPORATED

General Offices:
Racine, Wis.

000354

Factories:
Racine, Wis.
Batavia, N. Y.
Fowler, Cal.

41434—5-13—8

Printed in U.S.A.

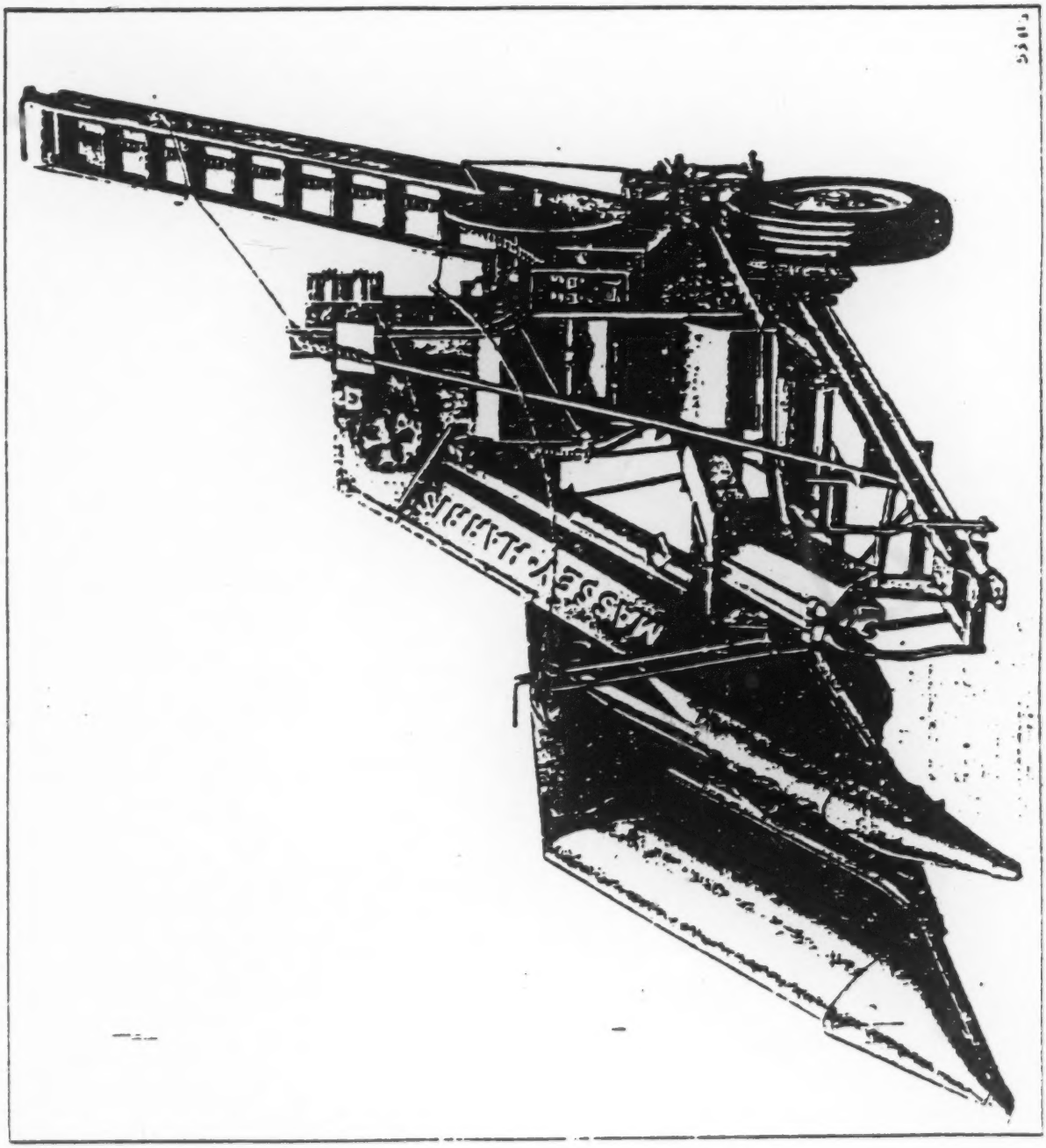


FIG. 2 - CORN PICKER - ONE ROW, PULL TYPE

SNAPPING ROLLS CLEARANCE

During operation the corn picker encounters such a wide variation of field and crop conditions that a set rule cannot be adhered to as a basis of adjustment. Adjustments must be made to suit the conditions.

Normally the snapping rolls should be run close together as possible and do a good job. This would be roughly 3/4" to 1" at the lower end of snapping rolls between the bearing hangers.

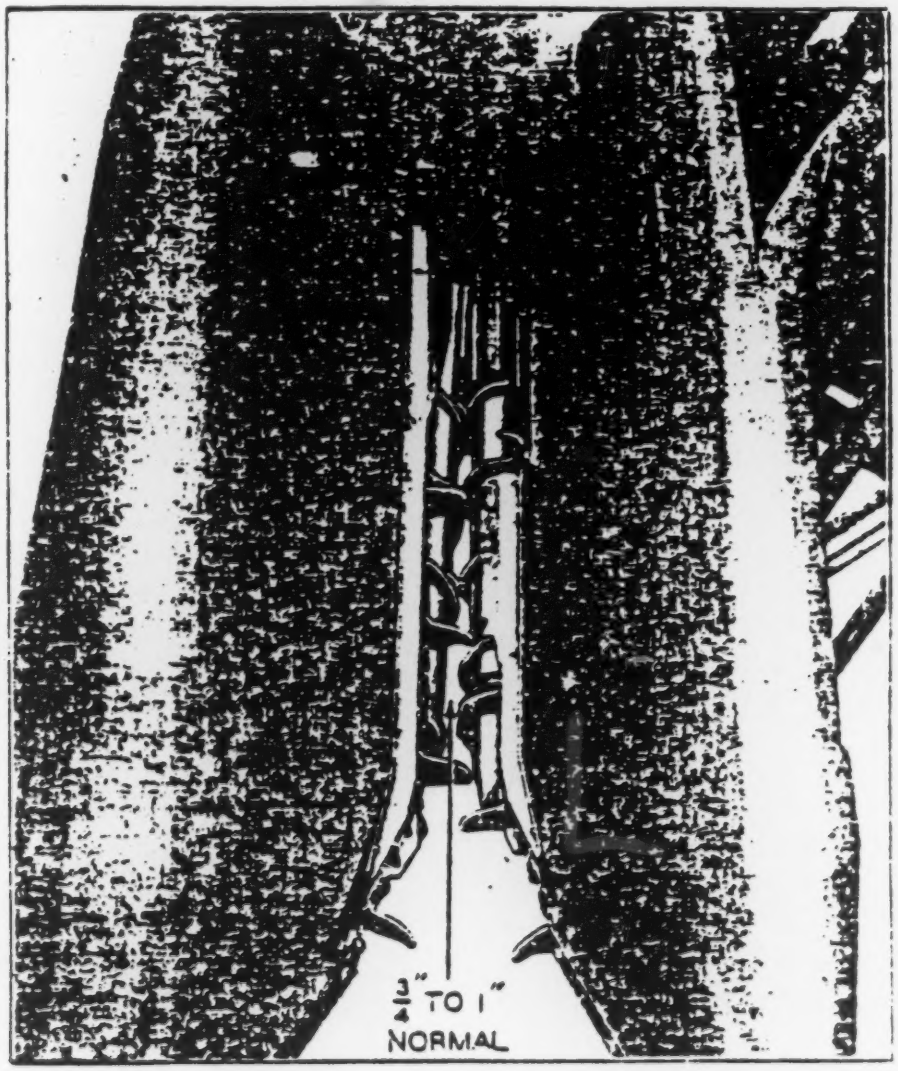


FIG. 20 - SNAPPING ROLL CLEARANCE MEASURED AT BEARING HANGERS SHOULD BE 3/4" TO 1" FOR NORMAL CONDITIONS.

When the corn is dry or frozen, as a rule the rolls can be set quite far apart and do a very good job of picking. Too far apart adjustment will cause excessive shelling and crushing of the smaller ears. In this condition, too close adjustment will cause excess trash to get into machine, breaking of stalks and in general reducing the cleanliness of picking as well as reducing the capacity.

In the early part of season and when the corn is tough and damp the rolls must be set close to snap the ear from the stalk. Wide adjustment in this case will cause ears to be crushed. If set extremely close, rolls will strike and movement of stalks thru the rolls will be hindered--hence plugging of machine.